

THE BLACKFEET TRIBE

IBLA 86-1440

Decided July 26, 1988

Appeal from a decision of the Lewistown, Montana, District Manager, Bureau of Land Management, recommending approval of a Mining Plan of Operations submitted by Santa Fe Mining, Inc. MT-068-86-PO2

Affirmed.

1. Federal Land Policy and Management Act of 1976: Mining Claims--Plan of Operations: National Historic Preservation Act

After receiving assertions by local Indians that an area being considered for a mining exploration project was within an area of historical and cultural significance to the Indians, BLM undertook an investigation which included a search of historical records, a class III cultural inventory report, and consultation and joint field examination with the Indians. Based upon the information obtained, BLM determined that the project area was not within a district or site included in or eligible for inclusion in the National Register of Historic Places, and that the mining exploration at the project area would not have an effect on the asserted historical and cultural characteristics of the area. It was proper for BLM to conclude, based on its findings, that a mining plan of operations could properly be approved in accordance with the Surface Management Regulations in 43 CFR 3809 and section 106 of the National Historic Preservation Act, as amended, 16 U.S.C. | 470(f) (1982).

2. Federal Land Policy and Management Act of 1976: Mining Claims--Plan of Operations: American Indian Religious Freedom Act

When recommending that the State of Montana approve a mining plan of operations pursuant to the Surface Management Regulations in 43 CFR 3809 and a memorandum of understanding between BLM and the State of Montana, BLM did not fail to comply with the American Indian Religious Freedom Act (AIRFA) 42 U.S.C. | 1996 (1982).

The record shows that BLM made a good faith effort to obtain and consider the views of the Indians and determined, based on the record, that the operations set out in the mining plan would not unnecessarily interfere with American Indian religious values and practices and would not prevent the Indians from access to their religious sites. BLM's action was in accord with the policy and requirements of AIRFA.

APPEARANCES: Vicky Santana, Esq., Browning, Montana for appellants; Richard K. Aldrich, Esq., Office of the Field Solicitor, Billings, Montana, for the Bureau of Land Management; Stephen E. Hosford, Esq., Albuquerque, New Mexico, for Santa Fe Mining, Inc.; Joseph G. Beaton, Jr., Esq., Minneapolis, Minnesota, for Ernest K. Lehmann & Associates.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

The Blackfeet Tribe has appealed from a decision of the Lewistown, Montana District Manager, Bureau of Land Management (BLM), dated June 30, 1986, recommending to the Montana Department of State Lands (MDSL) that the State grant approval of a mining plan submitted by Santa Fe Mining, Inc. (Santa Fe) for development of the Gold Butte Project in the Sweet Grass Hills, Liberty County, Montana. 1/ (MT-068-86-PO2).

The letter decision explained BLM's consideration of the Blackfeet Tribe's concerns stating:

The information that was presented by the Blackfeet delegation on June 19 made very clear the significance of the Sweet Grass Hills to the religious practices of the Blackfeet Tribe. We appreciate that the entire "Hills Complex" could be used for a variety of religious or ceremonial activities. However, the regulations under which this permit is being issued speaks only to protection of site specific locations. This action does not meet the criteria for "unnecessary and undue degradation" according to the regulations governing the operation of the Mining Law of 1872.

A copy of a June 23, 1986, letter of recommendation to MDSL was attached to the decision. In this letter BLM noted that, after field examination by a BLM archaeologist and an examination of the site with representatives of the Blackfeet Tribe, BLM was unable to identify any cultural sites in the mining development area which would require protection pursuant to section 106 of the National Historic Preservation Act (NHPA), 16 U.S.C. | 470 (1982).

1/ In the record and briefs of the parties "Sweet Grass" is often spelled "Sweetgrass."

BLM also set forth steps it had taken in consideration of the resource values included in the American Indian Religious Freedom Act (AIRFA), 42 U.S.C. | 1996 (1982), stating:

AIRFA was enacted to affirm that the United States Government would protect the First Amendment Rights of American Indians to practice their religion. We wrote to the tribal representative on the Blackfeet, Rocky Boy and Fort Belknap Reservations which were the Indian groups we considered to have modern ties to the Sweet Grass Hills. This consultation and subsequent joint field visit revealed that the Sweet Grass Hills in general are very important to the religious practices of the Blackfeet. However, no site specific conflict was identified for this Plan of Operations. Our field visit and consultation have ensured that this action will not damage any specific sites but we are unable to satisfy concerns about the broader spiritual values of the areas as described by the Tribal representatives.

Earnest K. Lehman & Associates and Santa Fe filed a Notice of Intent with the Lewistown District Office, BLM, on September 23, 1985. This notice, filed pursuant to 43 CFR 3809.1-3, gave notice of intent to conduct surface exploration work in the Gold Butte area of the Sweet Grass Hills, disturbing 5 acres or less.

After BLM received the notice it determined that the proposed road construction would result in a total surface disturbance of about 11.3 acres. Santa Fe was notified that, because the contemplated operation would disturb an area in excess of 5 acres, Santa Fe was required to submit and obtain approval of a plan of operations pursuant to 43 CFR 3809.1-4.

On October 7, 1985, Santa Fe filed its plan of operations. Phase I of the plan contemplated road construction with a total disturbance of approximately 8 acres. The plan provided that, prior to commencement of construction, the road corridor would be marked to enable a cultural resources inspection by a BLM archaeologist. After completion of road construction, geologic sampling would take place along the road cut to determine the best drill site locations. In Phase II of the plan drill pads approximately 30 feet wide would be constructed. These pads would be placed in the road, if possible. Exploratory drilling would then take place, using a reverse circulation TH-100 Ingersoll Rand Drill Rig.

The plan also outlined a proposed Phase III, the details of which would be submitted to BLM for approval following the completion of Phase II. The final design of Phase III was dependent on the geologic information gained during the Phase II drilling.

A field examination and archaeological inspection of the area was delayed by snow cover until May 30, 1986. The onsite examination was conducted by BLM staff. Representatives of Santa Fe and MDSL were present at

the time. BLM had no objection to the contemplated operations if the Plan of Operations were modified by stipulations regarding rehabilitation of disturbed areas. However, approval was withheld to allow BLM an opportunity to determine whether the area of operation included any American Indian religious sites.

BLM contacted various Tribes in the general area of the Sweet Grass Hills concerning the religious and cultural significance of this area. An on site examination of the project area was held with representatives of the Blackfoot Tribe, Santa Fe and BLM staff taking part. The Blackfoot representatives explained the sacred nature of the area, indicating that they had used the area for many years for vision questing. However, they were unable to identify any specific cultural sites in the area. Following analysis of its findings, BLM issued its June 30, 1986, decision recommending MDSL approval of Santa Fe's plan of operations. The Blackfoot Tribe appealed this decision.

On appeal, the Blackfoot Tribe asserts that the land at issue has historical and cultural significance as "documented in at least two books, Blackfeet and Buffalo, by James Williard Schultz, edited by Keith Seele and The Old North Trail, by Walter McClintock" (Statement of Reasons (SOR) at 1) (Pertinent sections of these books were submitted as exhibits to the SOR). Appellant also asserts that the Sweet Grass Hills contain important sites in the Blackfoot Religion stating that "religious practices take place there now and have taken place there since the Blackfeet have been in this area" (SOR at 1-2).

Appellant argues that the decision recommending the mining plan should be set aside because BLM failed to comply with section 106 of the National Historic Preservation Act, 16 U.S.C. | 470 (1982). Appellant asserts that when the Tribe raised the issue of eligibility of this area for the National Register, BLM should have sought compliance with the required procedures of NHPA regulations (SOR at 4-5).

Appellant states that "The Tribe is unable to conclude that there is no specific religious site on the 8 acres containing the undertaking because the Tribe is not aware of the religious practices of each and every one of its members" (SOR at 6). The Tribe claims the mining plan will have an adverse affect on the historical significance of the Sweet Grass Hills, stating "these Hills witnessed Indian Religious practices, significant battles between tribes, and the last buffalo hunts of the Indians" (SOR at 7).

Finally, appellant argues that BLM failed to comply with the American Indian Religious Freedom Act, 42 U.S.C. | 1996 (1982). Appellant relies on Northwest Indian Cemetery Protective Association v. Peterson, 764 F.2d 581 (9th Cir. 1985), to support the contention that the entire area of the Sweet Grass Hills is entitled to the same type of protection from this use to pre-serve their religious interest in the area (SOR at 8).

BLM has responded that appellant emphasizes the religious significance and historical and cultural values of the entire Sweet Grass Hills area with no specific boundaries. BLM points out that the Sweet Grass Hills cover an area of about 9 townships or 210,000 acres. The area includes three buttes (East Butte, Gold Butte, and West Butte) with Federal surface ownership being about 3 percent of the total area (7,210 acres). Federal mineral ownership is about 19 percent of the total area (40,103 acres). BLM asserts that the primary use of the land has been ranching, farming, and mineral exploration and development. It estimates that there are 372 unpatented mining claims and 19 producing oil and gas fields in close proximity to the Sweet Grass buttes (BLM Response at 4).

BLM maintains the activities proposed in Santa Fe's plan of operations are due and necessary, and do not constitute action, which would result in "unnecessary and undue degradation" (BLM Response at 6). BLM asserts it took the necessary steps to comply with section 106 of NHPA and 36 CFR 800 by preparing its Cultural Resource Class III Inventory Report, dated June 20, 1986, and that it had acted in accordance with established guidelines and procedures for consultation with the State Historic Preservation Office (SHPO). ^{2/} In this instance BLM asserts historic records refer only to the Sweet Grass Hills "in passing as a land mark used for an intermediate destination or navigation point similar to Cypress Hills, Bear's Paw Mountain, Missouri River, Marias River, Rocky Mountains and other recognizable features of the region" (BLM Response at 9).

BLM indicates that no site-specific cultural or historic events were identified in either the literature or the on-the-ground investigation by BLM and Tribal representatives. BLM also notes that "religious sites per se are specifically excluded from the reach of NHPA" (BLM Response 9-10). 36 CFR 60.4.

BLM concludes that the entire area of the Sweet Grass Hills has not been included in the National Register of Historic Places and that the proposed Santa Fe operations would not affect any historic sites within the Sweet Grass Hills. It asserts the Tribe did not establish eligibility by a general reference to the area's historic significance or by merely suggesting nomination for the Register (BLM Response 12-13).

BLM argues that Santa Fe's plan of operations complies with AIRFA and the First Amendment of the Constitution. Citing the legislative history of

^{2/} BLM's Class III cultural resource evaluation was conducted pursuant to a 1981 memorandum of agreement signed by BLM and the Montana SHPO. This agreement gives BLM the primary role in investigation and determining if measures are needed to further identify cultural resources. The agreement defers further SHPO comment if no National Register eligible cultural resources are identified in order to reduce unnecessary paperwork and time delays (BLM Exh. 5).

the Act, BLM asserts AIRFA is a statement of policy of the Federal government regarding the traditional Indians' right to practice their religions on public lands. BLM acknowledges that it must consider Indian religious values when making public land use decisions, but asserts it is not prohibited from adopting a program that conflicts with traditional beliefs or practices if the contemplated activity does not seriously interfere with or impair the practice of those religious beliefs (BLM Response 13-16).

Santa Fe also filed an answer in support of the BLM decision requesting approval of its plan of operations because: (1) the approval of the plan is not contrary to section 106 of NHPA; and (2) the plan did not violate the exercise of Blackfeet religious freedom protected by AIRFA.

Santa Fe maintains the Sweet Grass Hills are not presently included in the National Register and therefore, the Board need examine only the eligibility question and determine whether BLM acted properly. Santa Fe argues that the case law and regulations at 36 CFR 800 require a Federal review of a proposed undertaking's effects on a site before approving the proposed undertaking. It submits "at this point in time, as a matter of law, the NHPA and its regulations are not applicable to Santa Fe's Plan of Operations" (Santa Fe Answer at 11). Santa Fe maintains that, even if they were, BLM has complied with the regulations when holding two onsite inspections and meeting with Tribal representatives. It notes that "not a single site was identified as being adversely impacted by Santa Fe's Plan of Operations, and no overall historical adverse effects to the Blackfeet culture or religion were identified during the inspections" (Santa Fe Answer at 12).

Santa Fe contends that BLM's approval of its plan did not violate AIRFA. Referring to the legislative history of the Act and recent case law to support its assertion, Santa Fe states that authorization of a land use by a federal agency is in compliance with AIRFA if the agency obtains and considers the views of the Indians, and implementation does not prohibit Indian access to religious sites or religious objects or prohibit Indian religious ceremonial activities. Santa Fe asserts the proposed action would not inhibit access to the project area and the access road actually facilitates access to the area (Santa Fe Answer at 14-17).

[1] The surface management regulations are promulgated under authority granted by the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1701 (1982). The proposed exploration program at the Gold Butte project would disturb more than 5 acres, and Santa Fe was required by 43 CFR 3809.1-4, to submit a plan of operations for BLM review and approval before undertaking the project. Under 43 CFR 3809.1-6(a)5, "the plan cannot be approved until the authorized officer has complied with section 106 of the National Historic Preservation Act * * *." Under 43 CFR 3809.1-6(c), "the authorized officer shall undertake an appropriate level of cultural resource inventory of the area to be disturbed. The inventory shall be completed within the time allowed by these regulations for approval of the plan (30 days)."

We will first consider the application of section 106 of NHPA, as amended, 16 U.S.C. | 470(f) (1982). This section provides:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of any such Federal agency shall afford the Advisory Council on Historic Preservation established under sections 470i to 470n of this title a reasonable opportunity to comment with regard to such undertaking.

For properties listed in the National Register of Historic Places or Properties determined eligible for inclusion in the National Register, specified procedures are set out in 36 CFR 800.4 for the review of individual undertakings to determine the possible effects on these properties. ^{3/} The Sweet Grass Hills have not been listed on the National Register, nor has the area been officially determined to be an eligible property in accordance with the National Register criteria established by the Secretary of the Interior. See 36 CFR 60.4 and 36 CFR 63.

The highest elevations in the Sweet Grass Hills have been used in the past for vision quest activities (Cultural Inventory Report of June 20, 1986, pg. 2). The Tribe cites use of the Hills for religious purposes as a basis for historical significance. They describe the Hills as a sacred place relative to their traditional religious beliefs.

Religious sites are not intended for Register evaluation except under certain restricted significant historical contexts. The regulations setting forth the criteria for evaluation of properties at 36 CFR 60.4 specifically provide:

Ordinarily cemeteries, birthplaces, or graves of historical figures, properties owned by religious institutions or used for religious purposes * * * shall not be considered eligible for the National Register. However, such properties will qualify if they are integral parts of districts that do meet the criteria or if they fall within the following categories: (a) A religious property deriving primary significance from architectural or artistic distinction or historical importance * * *." [Emphasis added.]

^{3/} An "Eligible property" is any district, site, building, structure, or object that meets the National Register criteria. 36 CFR 800.2(f).

In light of these limited criteria, for the Sweet Grass Hills to qualify for evaluation or nomination as an eligible property or district, there must be evidence of significant historical importance.

Although the Blackfeet Tribe had indicated interest in having the entire area of the Hills set aside by a determination of eligibility, there is nothing in the file to indicate that either the Tribe or the Montana SHPO has taken any steps to formally nominate the area for inclusion in the Register.

Correspondence from the Montana SHPO to the Blackfeet Cultural Director indicated the possibility of consideration of the historical potential of the area. However, the SHPO carefully pointed out the complexity of the detailed procedures for an eligibility determination and stressed the need for verifiable documentation to substantiate a claim of historical importance. ^{4/}

Appellant indicates that it was carrying through with this nomination process, stating: "The Blackfeet Tribe is presently preparing a nomination form to include the Sweet Grass Hills in the National Register. Should the form be sent during the pendency of this hearing, a copy of the nominating form and any correspondence will be submitted for the record" (Blackfeet SOR at 5-6). No further submissions relating to this issue have been submitted for the record.

In any event, the record is clear that BLM seriously considered the possible effect of the contemplated activity on the character of the area during the evaluation process leading to its decision recommending approval of Santa Fe's plan of operations. Literature and historic records were researched for cultural and historic references to the Sweet Grass Hills and no site-specific cultural resource values were identified. Our review of the documents submitted by appellant in support of its claim of historical significance confirms BLM's conclusion that references to the Sweet Grass Hills are in the nature of ties to a landmark or recognizable geographic feature.

After determining that the general area of the Hills had not been deemed eligible for inclusion in the National Register, BLM conducted a field examination of the Gold Butte project area. This action was consistent with the requirements of Section 8111 of the BLM Manual. BLM also held an on-site meeting with the Tribe and MDSL to be sure specific historical and cultural resources would not be overlooked.

The Cultural Inventory Report, based on the May 20, 1986 field examination, noted previously recorded remains of an old mine and "Devils Chute

^{4/} Letter of July 10, 1986, from Mariella Sherty, SHPO, to Curly Bear Wagner, Director, Blackfeet Cultural Program (attachment to Blackfeet SOR.)

Cave" and an isolated find of a "large flake chopper of a fine-grain igneous material." These 3 sites were the only historic or archaeological resources identified and were not within the project area. BLM concluded the project would not have an effect on such resources. ^{5/} Under the terms of the 1981 memorandum of agreement with the Montana SHPO, when no cultural resources are discovered during the course of a Class III cultural resources field inventory, further consultations with SHPO are not necessary. See BLM Exh. No. 5, pg. 2). The record indicates that the field report was trans- mitted to the SHPO. ^{6/}

The Blackfeet Tribe contends that oral tradition described historic events in the Sweet Grass Hills not covered in literature. For this reason Tribal representatives were invited to meet with BLM and show specific areas of historical or cultural significance which might be impacted by the Santa Fe project. At a June 19, 1986, field examination Tribal represen-tatives indicated that significant locations important to the Blackfeet Indians were miles from the prospecting area. No specific sites were iden-tified within the project area. ^{7/}

Based on the record and submissions by the parties to this appeal, we find that BLM has met the requirements for determining the existence of historical and cultural resources in the Gold Butte project area of the Sweet Grass Hills. An intensive Class III field inventory of the area was undertaken. BLM acted in accordance with the guidelines in the 1981 memo- randum of agreement and Section 8111 of the BLM Manual. BLM sought input from Tribal representatives, the State, and Santa Fe in its efforts to identify and protect any verifiable resources in the project area. The Blackfeet have not substantiated their assertion that this area of the Sweet Grass Hills has sufficient historical importance to be considered for eligibility in the National Register.

No specific historical or cultural sites are identified in the project area, and the entire district encompassing the Sweet Grass Hills has not been included in or officially determined eligible for inclusion in the National Register of Historic Places. BLM was not required to take any further action in compliance with section 106 of NHPA prior to the approval of Santa Fe's plan of operation. See Birmingham Realty Co. v. General Services Administration, 497 F. Supp. 1377 (N.D. Ala. 1980).

^{5/} Cultural Resources Class III Inventory Report 86-MT-068-1, dated June 20, 1986.

^{6/} In a letter to Thomas F. King, Director of Office of Cultural Resource Preservation, dated July 16, 1986, BLM District Manager, Wayne Zinne indi- cates the results of the Archeological Survey are being filed with the Montana SHPO as per the memorandum agreement.

^{7/} Memorandum of June 25, 1986, from BLM District Archaeologist setting forth the details of the June 20, 1986, Sweet Grass Hills consultation.

If the Sweet Grass Hills had been deemed eligible for inclusion in the National Register, there would be no guarantee that this project would be prohibited. The regulations at 36 CFR 800.4 require only that the federal agency review a proposed undertaking's effects on the site before approval. If the Agency official, in consultation with the SHPO, determines that the undertaking would not affect the historical or cultural characteristics of the area, the undertaking could proceed. See 36 CFR 800.4(b). If on the other hand, the undertaking would have an impact on historical or cultural sites, the Agency would be required to conduct onsite inspections, hold public informational meetings and consider alternatives to avoid or investigate the undertaking's impacts. 36 CFR 800.6.

In either case BLM has taken all necessary steps to meet the requirements of the regulations. As previously noted, BLM delayed approval of Santa Fe's plan of operations in order to conduct the onsite meeting with the various representatives. The Tribal groups have been given ample opportunity to air their views and present evidence. BLM took additional steps to investigate the possibility that Santa Fe's project might have material adverse impact, even though the Cultural Inventory disclosed no historic or archaeological resources which would be effected by the operation. We can only conclude BLM made an honest, good faith and objective effort to consider the Indians' views and possible mitigation of effects. The record contains no evidence of historical or archaeological sites in the entire area of the Sweet Grass Hills which appellant has formally nominated or the SHPO has indicated as having potential for nomination to the National Register.

Appellant has presented nothing with this appeal to persuade us that what it claims to be historical sites will be adversely affected by this project or that BLM's actions were insufficient for compliance with NHPA. See, National Indian Youth Council v. Watt, 664 F.2d 220 (10th Cir. 1981).

[2] Appellant next argues that the approval of the mining plan should be set aside because BLM failed to comply with AIRFA. This Act provides in pertinent part:

On and after August 11, 1978, it shall be the policy of the United States to protect and preserve for American Indians their inherent right of freedom to believe, express, and exercise the traditional religions of the American Indian, Eskimo, Aleut, and Native Hawaiians, including but not limited to access to sites, use and possession of sacred objects, and the freedom to worship through ceremonial and traditional rites.

42 U.S.C | 1996 (1982).

A brief review of recent case law and the analysis of the legislative history of the Act confirms that the Act was not intended to protect Indian

religious activities to the exclusion of conflicting land use considerations. In Wilson v. Block, 708 F.2d 735, 747 (D.C. Cir.), cert denied, 464 U.S. 956 (1983), the Hopi and Navajo Indian Tribes attempted to prevent development of a ski area on the San Francisco Peaks in the Coconino National Forest, Arizona. They alleged that such development would seriously impair the use of the peaks for their traditional religious practices. The D.C. Circuit Court of Appeals rejected this contention and affirmed the District Court's adverse holding after reviewing the legislative history of AIRFA, stating:

Thus AIRFA required federal agencies to consider, but not necessarily defer to, Indian religious values. It does not prohibit agencies from adopting all land uses that conflict with traditional Indian religious beliefs or practices. Instead, an agency undertaking a land use project will be in compliance with AIRFA if, in the decisionmaking process, it obtains and considers the views of the Indian leaders, and if, in project implementation, it avoids unnecessary interference with Indian religious practices.

The Blackfeet Tribe relies primarily on Northwest Indian Cemetery Protective Association v. Peterson, *supra*, to support its claim that, when recommending approval of Santa Fe's plan of operations, BLM had not given due deference to the protection of religious sites within the Sweet Grass Hills. Appellant maintains that, in its decision, the Ninth Circuit announced a new standard for treatment of religious sites by federal land managers. Both Santa Fe and BLM argue that even under the Ninth Circuit decision, to maintain a First Amendment religious freedom claim, the Indians must demonstrate that the proposed land use will burden their religion.

The Supreme Court recently considered this case on a writ of certiorari and reversed the Ninth Circuit Court's decision. In Lyng v. Northwest Indian Cemetery Protective Association, 108 S. Ct. 1319, 56 U.S. L.W. 4292, 4302 (April 19, 1988) the Supreme Court set forth the most recent statement of the law on this matter. That decision is clearly dispositive of appellant's arguments as to the protection of the Indians' First Amendment religious freedom right under AIRFA.

In Northwest Indian Cemetery the Forest Service had been enjoined from placing a timber harvesting plan in effect and constructing a paved road through federal land within the Chimney Rock area of the Six Rivers National Forest. This area had historically been used by certain American Indians for religious rituals that depend on privacy, silence, and the undisturbed natural setting. The Indians asserted the road would have adverse effects on Indian religious practices.

Contrary to the Indian's claims, the Supreme Court found the Free Exercise Clause of the First Amendment did not prohibit the Government from permitting timber harvesting in the Chimney Rock area or constructing the proposed road. Quoting from Bowen v. Roy, 476 U.S. 693, 700 (1986), the

Court rejected the Indian's claim that the road would create such a disruption of the natural environment as to diminish the sacredness of the area, stating " * * * the Free Exercise Clause affords an individual protection from certain forms of governmental compulsion, it does not afford an individual a right to dictate the conduct of the Government's internal procedures."

The Court recognized that the logging and road building projects at issue could have devastating effects on traditional Indian Religious practices "intimately and inextricably bound up" with the unique features of the Chimney Rock area known to the Indians as the "high country." While admitting that constructing this road could even destroy the Indian's ability to practice their religion, the Court stated:

[T]he Constitution simply does not provide a principle that could justify upholding respondent's legal claims. However much we might wish that it were otherwise, Government simply could not operate if it were required to satisfy every citizen's religious needs and desires.

* * * * *

The First Amendment must apply to all citizens alike, and it can give to none of them a veto over public programs that do not prohibit the free exercise of religion.

56 L.W. at 4295.

Noting that the Indians' need for privacy, intense meditation and undisturbed naturalness during their religious practices, "could easily require de facto beneficial ownership of some rather spacious tracts of public property," the Court concluded, "Whatever rights the Indians may have to the use of the area, however, those rights do not divest the Government of its right to use what is, after all, its land." 56 L.W. at 4295-4296.

The Court also found the Government's action to be completely in accord with AIRFA. It stressed that the Government's right to the use of its own lands need not and should not discourage it from accommodating religious practices similar to those engaged in by the Indian respondents. It noted that the Forest Service had taken numerous steps to minimize the road's impact on the Indians' religious activities--such as choosing the route that best protects sites of specific rituals from adverse audible intrusions, and reducing the visual impact of the road on the surrounding country.

The Court found that neither the provisions nor the intent of AIRFA was a basis for an injunction against the road. The Court stated: "Nowhere in the law is there so much as a hint of any intent to create a cause of action or any judicially enforceable individual rights." 56 L.W. 4296.

We find that BLM's action was consistent with this most recent statement of the law in this case. BLM complied with AIRFA when it obtained and considered the views of the Indians and determined that operations contemplated in the plan of operations would not prohibit the Indian's access to religious sites in the project area. The record shows that BLM conducted adequate consultations with the Indians in an effort to protect their religious sites and consider their views and their religious practices. BLM is not required by AIRFA to preclude other public land use if the Indians are not in agreement with that use. As in Northwest Cemetery, the Indians are not to be given veto power over a conflicting use of Government land. The record supports a determination that BLM satisfactorily considered the Indians' religious values and practices. Appellant has presented nothing that would establish that BLM's action was not in accord with the policy and requirements of AIRFA.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

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R. W. Mullen
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

John H. Kelly
Administrative Judge